BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN SHIRLEY, DECEASED	)	
Claimant	)	
	)	
VS.	)	
	)	
CENTURY PLUMBING	)	
Respondent	)	Docket No. 248,847
	)	
AND	)	
	)	
FIREMAN'S FUND INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the March 10, 2006 Award by Special Administrative Law Judge (SALJ) Vincent L. Bogart. The Board heard oral argument on June 16, 2006 in Wichita, Kansas.

APPEARANCES

John S. Seeber, of Wichita, Kansas, appeared for the decedent's surviving spouse, Kerri Shirley and her two children, Jessica and Ryan Shirley (collectively referred to as "claimant"). Terry J. Torline, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The SALJ concluded that claimant sustained an accidental injury on January 5, 1998 and then awarded decedent's survivors[1] a 47.6 percent work disability[2] based upon

[1] Depending on the date of accident, there is a dispute as to whether decedent's survivors include both of the children. The SALJ did not address this dispute, but merely entered an order awarding benefits to be paid to both the surviving spouse and the two children. This issue is moot given the Board's finding in

a task loss of 95.23 percent and a wage loss of 0 percent along with a period of temporary total disability benefits (TTD). In doing so, the ALJ explained that although he could not "reconcile the exhibits to determine an exact or nearly exact loss of wages", he nonetheless, concluded the decedent sustained a wage loss "sufficient to preclude the triggering of K.S.A. 44-510e(a) to prevent a finding of permanent partial general disability in excess of the functional impairment."[3]

Respondent has appealed the SALJ's Award arguing the SALJ erred in concluding decedent's date of accident was January 5, 1998 rather than the decedent's last date worked, February 19, 2002. And depending on the date of accident found by the Board, the SALJ may have inappropriately included two of decedent's children as parties when they were not, at the time of the accident, considered "dependent" under the Kansas Workers Compensation Act. Moreover, respondent believes that at the time of decedent's death, no payments were yet due (as no Award had been issued). Thus, pursuant to K.S.A. 44-510e(b), his death abrogates any right to receive payments.[4]

Respondent further contends decedent's survivors failed to meet their burden of proving either an average weekly wage or a wage loss following claimant's alleged work-related accident. And failure to establish a post-injury wage loss in excess of 10 percent entitles decedent for a functional impairment only.[5] Thus, the SALJ erred when he concluded that there was an insufficient basis to determine the decedent's post-injury wage loss, but nonetheless found a work disability. Respondent also challenges the ALJ's finding that claimant's "January 5, 1998[,] accident was the major cause from which the treatment and liability resulted"[6] asserting that this is the incorrect evidentiary standard for purposes of determining whether and when an injury arises out of and in the course of an employee's employment.

Decedent's counsel argues that an award should be entered in favor of decedent's wife and (then) dependent children for the balance of the $100,000 due in this case, based

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this matter.

[2] Although the SALJ's Award references a 60 percent work disability on page 6 of the Award, it is clear from the findings of fact and the SALJ's final computations, that the work disability was intended to be 47.6 percent rather than the 60 percent.

[3] SALJ Award (Mar. 10, 2006) at 6.

[4] The parties have stipulated that decedent's death is causally related to his work-related accident.

[5] K.S.A. 44-510e(a).

[6] SALJ Award (Mar. 10, 2006) at 4.

upon a 95 percent task loss and a 70.4 to 77.12 percent wage loss.[7] Decedent's survivors argue that there is uncontroverted evidence that decedent injured his elbows on January 5, 1998, and it was that accident that caused his need for the eventual surgeries in 2002 rather than his subsequent repetitive work activities as a plumber. Thus, his accident date is January 5, 1998, a date during which he had workers compensation insurance coverage.

The decedent's survivors also contend that they are "due" the balance of decedent's award and that K.S.A. 44-510(e)(b) abrogates only those payments that might have been paid had claimant lived past March 13, 2003, the day he died. And because the weeks of work disability would have paid out before he died, they are entitled to the balance of the Award.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

1. Decedent owned and operated Century Plumbing, a sole proprietorship from 1992 up to 2003, when he died. He performed general plumbing duties including installing garbage disposals, water wells, water heaters and toilets. Claimant testified that this was a demanding job and that he did most of his work alone, as he had no employees. By all accounts this was a labor intensive profession and claimant used both of his upper extremities for nearly all of his jobs.

2. On August 20, 1997, decedent saw his family physician Dr. Kevin C. Hoppock for problems with both his elbows which he had begun to notice over time as he was working.[8] Dr. Hoppock diagnosed decedent with bilateral epicondylitis, right worse than the left.[9] Epicondylitis is a "description of a symptom complex of pain where tendons attach to the distal humerus just above the elbow joint."[10] In this case, decedent's complaints relate to his medial epicondylitis which is the area of attachment involved in gripping.[11] Decedent was given pain medication for his complaints and an injection in his right elbow. According to the records, claimant's right elbow pain dramatically decreased

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[7] Claimant's Submission Brief at 26-28 (filed May 2, 2006).

[8] P.H. Trans. at 8.

[9] *Id.* at 8-9.

[10] Davidson Depo. at 23.

[11] *Id.*

with the injection. In September 1997, claimant returned to Dr. Hoppock with left elbow complaints and he was given an injection. These injections continued in October 1997. All the while claimant continued to work as a plumber.

3. Thereafter, on January 5, 1998, decedent was installing a pump in a well. As he was placing the pump down in the well he lost his grip and the pump fell. Rather than risk the loss of the pump he attempted to catch the long pipe that was attached to the pump. In doing so, he gripped very tightly with both hands. His forearms struck the casing around the well, but claimant was eventually able to stop the pump from falling.[12] According to claimant, he felt pain in his arms and he had to sit for 15 minutes before he could continue with his work. Decedent testified the pipe he was working with weighed 60 to 70 pounds, and he had to grab it four to five times to get it to stop. Decedent testified that he finished the job, but then called his family physician Dr. Hoppock. By this time decedent testified his arms and elbows were red and swollen.

4. Decedent saw Dr. Hoppock several days later. His records do not reflect any redness, just "point tenderness".[13] Dr. Hoppock provided oral medications and deferred any injections. Although decedent continued to see Dr. Hoppock, there was no further notation of his elbow complaints until April 24, 1998 when decedent saw Dr. Douglas Davidson, an orthopaedist. This referral was apparently at Dr. Hoppock's request.

5. Decedent did not miss any work up to the time he saw Dr. Davidson.[14] Decedent also testified that his elbows hurt "much worse" than before.[15]

6. When decedent saw Dr. Davidson on April 24, 1998, he made no mention of the January 5, 1998 accident. Rather, he described his ongoing problems with both elbows and his recent decision to have surgery. Decedent also indicated that while the injections would provide temporary relief, the pain would return and he was concerned about the long term health effects of the substances used in the injections.

7. Dr. Davidson concluded that decedent was not yet a surgical candidate and could be successfully treated with injections. Dr. Davidson offered him injections which decedent accepted on the right side. Over the course of the next 3 years decedent had a total of 11 injections on the right and 9 on the left. Decedent testified the injections eliminated the pain, but over time, the pain returned.

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[12] P.H. Trans. at 11.

[13] Davidson Depo., Ex. 1 at 21 (1/11/98 entry).

[14] P.H. Trans. at 27,31.

[15] *Id.* at 31.

8. While decedent was receiving his treatment he continued working. As his pain complaints flared up, he would return to Dr. Davidson who would provide an injection and decedent would then return to work. It is obvious from the records that decedent was concerned about surgery and the impact on his business if he were unable to work. Dr. Davidson testified that he continued to speak with decedent about surgery, but because decedent was unwilling to stop working following the procedure and because Dr. Davidson was equally unwilling to proceed under those circumstances, surgery was not done.

9. In connection with decedent's preliminary hearing request for further treatment, Dr. Davidson was deposed. He was given a rather lengthy hypothetical question which included all of the facts set forth above. In response, Dr. Davidson stated the following:

> I would like to give a preface to my reply and then my reply. Preface to my reply is that as documented in the record, I have met with Attorney Seeber on two occasions prior to today. He let me know that he was representing John Shirley in this case. I have enough experience in orthopedics to understand, at least from an orthopedist's standpoint, some of the legal repercussions of having a pre-existing injury and then filing a workers' comp claim. I explained to Attorney Seeber that I didn't see enough details of the alleged workers' comp injury in the record to be able to compare the severity of the alleged workers' comp injury to decide whether or not that was going to be legitimate in my opinion. I suggested that one way to get that into evidence would be to situate it as a hypothetical and then I understand that it will be a legal decision whether or not that hypothetical will be found to be, in fact, representing the facts, the true facts as the court will decide.
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> For my answer, however, now I am going to assume the facts in the hypothetical as true, and my answer is that although there was some pre-existing condition, the injury as described in the hypothetical seems significant enough to me. It seems believable to me. It is not difficult for me to accept that that is the sort of thing that would happen on the job, and that is a significant enough injury that I believe that injury has more of an effect on his need for treatment that I gave him than did the pre-existing condition. This I think meets the qualifications of more than likely, that is more than 50 percent of the need for the ongoing treatment is related to the incident as alleged in the hypothetical.[16]

Dr. Davidson went on to explain that the most common history he hears for tendinitis in any area of the body is when someone does an unusually repetitive amount of work. Often times the resulting complaints resolve, but other times they persist. He also testified that there can be acute injuries which cause similar complaints.[17]

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[16] Davidson Depo. at 13-15.

[17] *Id.* at 27.

Taken as a whole, Dr. Davidson indicated that he believed the incident in January 1998 was more likely than not related to decedent's future treatments than was decedent's pre-existing complaints and condition.[18]

10. Decedent was referred by respondent to Dr. J. Mark Melhorn for evaluation and treatment on June 14, 2002. During that first visit, decedent explained his type of work activities and also described what occurred on January 5, 1998. According to Dr. Melhorn, claimant described pain to his left elbow following the incident with the well pump and followed 5 months later with pain in the right elbow.[19]

Dr. Melhorn diagnosed epicondylitis and medial epicondylitis on the right, although he believed it was difficult to relate the right elbow complaints specifically to the traumatic event as they began five months after the stated traumatic event.[20] Dr. Melhorn also testified that he did not recall decedent providing a history of pre-existing diagnosis of medial epicondylitis.[21]

Following this first examination, Dr. Melhorn opined that decedent's impairment was 0 percent for the right arm for abnormal motion, 5.65 percent for pain, discomfort and loss of sensation, 1.4 percent due to loss of strength and 0 percent for impairment at the skin level. Dr. Melhorn found claimant's total impairment to be 7.05 percent to the right upper extremity.[22] Dr Melhorn also opined that decedent sustained a loss of 13 out of a total 21 tasks based upon his restrictions of limiting lifting to 75 pounds or less.

When asked about the impact of the well incident upon decedent's condition and whether the well incident caused the need for all of decedent's subsequent medical treatment and the surgeries, Dr. Melhorn responded as follows:

> I believe it is probably a combination of two events. I believe he had some pre-existing medial epicondylitis that was aggravated by the well incident.[23]

He was then asked:

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[18] *Id.* at 31.

[19] Melhorn Depo., Vol I (Mar. 11, 2006) at 5

[20] *Id.* at 7.

[21] *Id.* at 8.

[22] *Id.*, Ex. 1 at 1; American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

[23] *Id.* at 23.

> Q: The well incident aggravation is the big event from that point on?
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> A: It is difficult to -- it would be difficult to say that it is the big event. What I can say is he had medial epicondylitis. The natural course of medial epicondylitis is a continued chronic course. The individual experienced a specific traumatic event which could have aggravated or accelerated that course. It is possible that even after that aggravation, though, that his condition could have gotten better or returned to, quote, base line, which is sort of an on again/off again type pattern that he was experiencing prior to the well incident. In this case, his condition didn't -- it continued to get worse and required additional treatment. I am not sure anyone can say for sure why his condition didn't get better and required treatment.
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> Q: You cannot say that it is more likely than not caused by the well incident?
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> A: I cannot say that.[24]

In a second subsequent deposition, Dr. Melhorn further amplified his opinion and stated:

> . . . My impression would be that probably continuing to perform his work activities subsequent to the well event probably had some contribution to his symptoms warranting surgical treatment. But I wouldn't say that those, in and of themselves, are the only cause either. I think it is a combination cause that eventually resulted in this individual having to have surgery.[25]

Dr. Melhorn then rated claimant's left elbow at 10.55 percent permanent partial impairment to the left arm. And he revised his restrictions and lowered the maximum weight limit to 50 pounds. This revised set of restrictions decreased decedent's task loss to 10 out of the 21 tasks, although Dr. Melhorn was not able to determine if many of the remaining 11 exceeded his restrictions as the description were, in Dr. Melhorn's view, insufficient.

Decedent was also evaluated by Dr. Pedro Murati on December 19, 2002. Like the other physicians, Dr. Murati diagnosed bilateral medial epicondylitis but he also diagnosed ulnar neuropathy to the right elbow. When asked, Dr. Murati adopted Dr. Davidson's reasoning with respect to causation of decedent's condition and its connection to the well incident.

He also assigned the following restrictions:

> No heavy grasping with both hands and no lift/carry/push/pull greater than 35 pounds and that only occasionally. No use of hooks or knives or vibratory tools in

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[24] *Id.* at 23-24.

[25] *Id.* Vol. II (May 11, 2004) at 10.

> both hands. Occasional repetitive grasp and grab. Frequent hand controls on both hands and limit lift/carry/push/pul to 20 pounds.[26]

Based upon the 4th edition of the *Guides*, Dr. Murati assigned a 28 percent permanent partial impairment to the whole body. A significant portion of Dr. Murati's rating is based upon the decedent's poor performance on the grip strength tests. Dr. Murati conceded that if such grip strength test results are disregarded, then the decedent's permanent partial impairment is 6 percent to the body as a whole. Curiously, Dr. Murati was unaware of claimant's prior history of epicondylitis.

At respondent's request, Dr. Reiff Brown examined decedent's records and was asked to provide an opinion as to the cause of decedent's bilateral arm condition. According to Dr. Brown, bilateral medial epicondylitis is a repetitive microtrauma type condition. An individual's frequent grasping causes microtraumas which lead to inflammation and pain.

According to Dr. Brown, plumbing activities would aggravate and accelerate this condition.[27] Further, as long as decedent was performing such activities, decedent would continue to aggravate his condition. As for the impact of the January 5, 1998 event, he refers to that as an aggravation that stair stepped decedent's condition to a higher level. And following that event, he plateaued.[28]

CONCLUSIONS OF LAW

Resolution of the bulk of the issues in this claim are dependent upon the decedent's legal date of accident. Based upon the parties' arguments and the evidence, decedent's date of accident was either January 5, 1998, the date of the well incident, or February 2002, when he left work to have surgery or March of 2003, when he last worked. Decedent's survivor's advocate January 5, 1998 as the date of an acute injury as that is the period during which decedent had elected coverage under the Act and in fact had workers compensation coverage with respondent's insurance carrier. Conversely, respondent urges the Board to find a later date of accident, either February 2002 or March 2003, either of which affords decedent no coverage.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

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[26] Murati Depo. at 12.

[27] Brown Depo. at 6.

[28] *Id.* at 8-9.

right depends.[29] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[30]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[31]

Following creation of the bright line rule in the 1994 *Berry*[32] decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*,[33] which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or micro-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* also focuses upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use or micro-trauma injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[34]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

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[29] K.S.A. 44-501(a) (1993 Furse).

[30] K.S.A. 44-508(g) (1993 Furse).

[31] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

[32] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[33] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[34] *Id.* at Syl. ¶ 3.

There appears to be a connecting thread between the decisions beginning with *Berry* that address the date of accident issue in cases involving injuries from repetitive trauma. It is a variation of the last injurious exposure rule previously followed in occupational disease cases. (The similarity between repetitive trauma injuries and occupational diseases was not lost upon the Court in *Berry* when it described one such condition, carpal tunnel syndrome, as "neither fish nor fowl.") A claimant's last injurious exposure to repetitive or cumulative trauma is when he or she leaves work. But when the claimant does not leave work or leaves work for a reason other than the injury, then the last injurious exposure is when the claimant's restrictions are implemented and/or the job changes or job accommodations are made by the employer to prevent further injury.

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[35]

Based upon the facts of this case, the Board concludes that decedent suffered from a series of microtraumas as a result of his repetitive work activities as a plumber. Those microtraumas compelled him to seek treatment beginning in 1997 and resulted in a diagnosis of bilateral medial epicondylitis. Then in 1998, he suffered an acute injury that resulted in an aggravation or acceleration of that pre-existing condition. Thereafter, he continued to perform his regular work duties even after each round of injections to his elbows and as a result, suffered additional aggravation to each of his upper extremities. Because decedent continued to aggravate his condition, the Board concludes that the date of accident is either February 2000, the date he first left work to have surgery or March 2003, the date he last worked.[36] In either instance, the parties agree that the decedent had elected not to be covered by the Act as of June 16, 1998 and therefore, decedent, or more accurately, decedent's survivors are not entitled to benefits under the Act. Therefore, the SALJ's Award must be reversed.

The Board is mindful of decedent's testimony that he never had a subsequent injury after January 5, 1998 and that his elbows hurt far worse after the January 5, 1998 accident. However, the medical treatment provided to him and the fact that he continued to work what even he describes is a heavy physical occupation belie this contention. Moreover, the physicians seem to be in general agreement that continuing in the occupation of a plumber ensures additional aggravations. What is clear is that claimant was diagnosed with a repetitive type injury condition in 1997. He suffered a subsequent accident in 1998, but his resulting injury was the same condition as had been previously diagnosed. There was certainly some aggravation of his symptoms but overall, he continued to receive the same treatment he was receiving before 1998. When that

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[35] *Treaster*, Syl. ¶ 4.

[36] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

treatment, the injections, failed to provide sufficient relief, surgery was finally performed. Under this fact scenario, the Board finds claimant's date of accident to be well after he elected to forego the benefits afforded by the Workers Compensation Act.

Given the legal finding set forth above, the remaining issues are moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Vincent L. Bogart dated March 10, 2006, is reversed and decedent and his survivors are not entitled to any Award against this respondent and its insurance carrier for the reason that there is no coverage under the Act.

The Special Administrative Law Judge's assessment of costs is hereby affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2006.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: John S. Seeber, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Vincent L. Bogart, Special Administrative Law Judge
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director